Robert Schuman Centre

European Administrative Law and the Global Challenge

CAROL HARLOW

RSC No. 98/23

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

EUI Working Paper RSC No. 98/23

Harlow: *European Administrative Law and the Global Challenge*

The Robert Schuman Centre was set up by the High Council of the EUI in 1993 to carry out disciplinary and interdisciplinary research in the areas of European integration and public policy in Europe. While developing its own research projects, the Centre works in close relation with the four departments of the Institute and supports the specialized working groups organized by the researchers.

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE

European Administrative Law and the Global Challenge

CAROL HARLOW*

*Professor of Public Law at
the London School of Economics and Political Science

EUI Working Paper **RSC** No. 98/23

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in June 1998
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

Abstract

This article looks at the development of EC Administrative Law, identifying two main theoretical trends. The first, or 'control' theory, approaches administrative law from the angle of citizen-state relations and from the viewpoint of the citizen. The second, or functional, approach is to treat administrative law as a body of rules designed for the implementation of policies. The article suggests that EC administrative law originated inside the second theory, in part because of its French antecedents. Over the years, however, the first theory has gained the ascendant. The consequence for EC administrative law of the alternation between these two positions has been juridification (by which is meant the objectivisation of administrative law through a continual process of regulation and rulemaking and, on the other hand, litigation and rul-interpretation. The article concludes by suggesting that, in the interest of healthy democratic development, more attention should be paid to regulation through 'soft law' and to extra-judicial means of dispute-resolution.

I. PAST INDICATIVES**

(a) A Global Context

It is perhaps not surprising that those administrative lawyers, generally working in the common law world, who have experienced the full force of privatisation, 'New Public Management'[1] and the sudden tilt away from the interventionist towards the regulatory state, should question the role of administrative law. By and large the experience has proved a chastening one, in which the economist's values of economy, efficiency and effectiveness, together with an augmented accountancy concept of 'value for money', transmitted through audit,[2] have seriously challenged the classic procedural values of administrative law. Public law has lost ground and its sphere seems to be shrinking. While there is general agreement on the nature of the problems, there is as yet little sign that answers are emerging or will be forthcoming.

The context in which post-modern administrative law is required to operate and the problems which it faces are of a global nature. Strange[3] warns of the threat posed by a new world order, in which 'the territorial boundaries of states no longer coincide with the extent or the limits of political authority over economy and society'. New power structures have emerged, vested in industrialists, commercial operators and those who control access to knowledge and information through information technology and the media. Globalisation has resulted in a shift of power from public to private actors, endangering the forms of statal democracy on which we have learned to rely for regulation:[4]

> Because the international and regional organisations in no way constitute supranational governments and because they narrowly focus on trade, they are freeing business from the traditional constraints imposed by national governments and societal interests without substituting some equivalent at the supranational level. The result is a strengthening of business, with transnational corporations less tied to states and national interests, and a weakening of the nation-state overall, and in particular of

** I wish to thank friends at the European University Institute, especially Professors Yves Mény and Renaud Dehousse, for their generous support, and my colleague Richard Rawlings for his advice and help over the years.

[1] On the development of which see, C. Hood (1991) "A Public Management for All Seasons" *Public Administration*, 69, 3; P. Hoggett (1996) "New Modes of Control in the Public Service" *Public Administration*, 74, 9; C. Hood (1995) "Emerging Issues in Public Administration", *Public Administration*, 73, 165.

[2] M. Power (1994) *The Audit Explosion*, Demos. See also C. Harlow and R. Rawlings (1997) *Law and Administration*, (2nd. ed.) Butterworths, Ch. 5.

[3] S. Strange (1996) *The Retreat of the State, The Diffusion of Power in the World Economy*, Cambridge University Press, p.ix; S. Strange (1995) "The Defective State", *Daedalus*, 55, 124.

[4] V. Schmidt (1995) "The New World Order Inc: The Rise of Business and the Decline of the Nation-State" *Daedalus*, 124, 75-6. See also A. Moravscik (1993) "Preferences and Power in the EC: A Liberal Intergovernmentalist Approach", *Journal of Common Market Studies*, 31.

the voice of the people through legislatures and non-business, societal interests.

Economist Majone discerns[5] a global change in styles of governance, fastening on the unifying features of privatisation, liberalisation and deregulation, fiscal retrenchment, economic and monetary integration 'and various policy innovations associated with the New Public Management paradigm'. The consequence is to limit the role of the interventionist or positive state, 'in particular by restraining its power to tax and spend, while enhancing the power of rule making and, hence, of the regulatory state'. Some public lawyers too are beginning to think in terms of a 'global era of administrative law', relating this both to the emerging post-modern forms of governance and to New Public Management.[6] Thus Taggart again notes[7] as factors which have 'fundamentally altered the political and social landscapes in countries around the world': deregulation, commercialisation, corporatism, downsizing of business and public administration and globalisation.

Globalisation, however, is seen as the terrain of private, rather than public law, often to the exclusion of the state which forms its traditional sphere of operation.[8] Not surprisingly, public lawyers, thrown into a defensive position, have been concerned to assert a claim to the new terrain, for example, by asserting jurisdiction over proliferating regulatory agencies[9] or (in the common law world) demanding a public law of contracts.[10] In systems which recognise a sharp public/private distinction, the very foundations are shaken, as the worth of the basic distinction comes into question.[11]

As Common Market, the European enterprise is a manifestation of these trends; as Community or Union, its 'supranational government' was designed to combat the same tendencies. The effect, as Muller and Wright caution, has been to loosen the regulatory grip of nation-states and increase the regulatory role of Brussels [12]:

---

[5] G. Majone (1997) "Causes and Consequences of Changes in the Mode of Governance", *Journal of Public Policy*, 139-40.

[6] See, e.g., A. Aman Jr. (1997) "Administrative Law for a New Century" in M. Taggart (ed) *The Province of Administrative Law*, Oxford, Hart Publishing, 93.

[7] M. Taggart (1997) "Introduction" in M. Taggart (ed.) *The Province of Administrative Law*, Oxford, Hart Publishing, 2.

[8] G. Teubner (1996) "Global Bukowina: Legal Pluralism in the World Society", in G. Teubner (ed.) *Global Law Without a State*, Dartmouth, and G. Teubner (1997) "Breaking Frames: The Global Interplay of Legal and Social Systems", *American Journal of Comparative Law*, 45, 149.

[9] J. Black, (1996) "Constitutionalising self-regulation", *Modern Law Review*, 59, 24.

[10] I. Harden (1992) *The Contracting State*, Milton Keynes, Open University Press.

[11] F. Dubois, M. Engueleguelé, G. Lefèvre, M. Loiselle (1993) "La contestation du droit administratif dans le champ intellectuel et politique" in J. Chevallier (ed.) *Le Droit administratif en mutation*, Paris, Presses Universitaires de France, 159-70.

[12] W. Muller and V. Wright (1994) "Reshaping the State in Western Europe: The Limits to Retreat" in W. Muller and V. Wright (eds) *The State in Western Europe Retreat or Redefinition West European Politics*, Special Issue, 7, 6.

> To an extent which is not fully appreciated, the EU is slowly redefining existing political arrangements, altering traditional policy networks, triggering institutional change, reshaping the opportunity structures of member states and their major interests. These interests are now increasingly entangled in relationships at four territorial levels: the international, the European, the national and the local, and for some of these interests it is by no means clear that the national level is the most important.

Majone firmly classifies the Community system of governance as regulatory in character,[13] in which centralisation and executive policy discretion, so long the target of national administrative law systems, have given way as tools of government to regulation, or rather 'a combination of deregulation and re-regulation, possibly at a different level of governance'. Discretion has not, of course, been eliminated; it has changed its plumage and habitat. If any system of administrative law needs to face up to the problems posed by globalisation, it is that of the European Community. Doctrinally, its failure in this respect is rather striking.

(b) Administrative Law: Alternative Traditions

Theories of administrative law can loosely - I stress this word - be classified into two broad groupings. The first group, which I shall here describe as 'control theories', see legal control of government as the core of the subject. These theories stress law's function in controlling administration and accord to courts the central place in the struggle for control. Typically, such theories are highly individualist in their concern for private rights. In one classic definition of the type, Piva, an Italian public lawyer,[14] defines public law as 'the law which regulates the relationship between the State and its citizens... mainly and specifically aimed at regulating the relation between the State, on the one hand, and courts on the other'. A more vivid definition comes from Wade's classic English textbook:[15]

> A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject... The primary purpose of administrative law is... to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok... As well as power there is duty. It is also the concern of administrative law to see that public authorities can be compelled to perform their duties if they make default... The law provides compulsory remedies for such sitiuations, thus dealing with the negative as well as the positive side of maladministration.

---

[13] G. Majone (1996). *Regulating Europe*, London, Routledge.

[14] P. Piva (1995) "An Introduction to Italian Public Law", *European Public Law*, 299-300.

[15] HWR. Wade and C. Forsyth (1994) *Administrative Law*, Oxford, Clarendon (7th ed.), 5-7. Harlow and Rawlings, above note 2, describe this as a 'red light' theory because of the emphasis on controls. See also M. Loughlin (1994) *Public Law and Political Theory*, Oxford, Clarendon, 184-90, who uses the term 'conservative normativism'.

The thrust of control theories differs strikingly from those in the second grouping, which I shall label 'instrumentalist theories'.[16] What links these theories is that they look outwards rather than in; to put this differently, they are essentially administration-centred. Bureaucracy is accepted and welcomed as an essential tool for effective policy-making and governance, and law seen as an instrument for the proper implementation of policy. For instrumentalists, 'law' is widely interpreted so as to include legislation and regulation, and rulemaking becomes a central task for administrative law.[17] The French administrative lawyer, Charles Debbasch, provides a typical definition from this school [18]. Debbasch takes his subject to be 'the administration and the law applicable to it'. It is significant that he specifies in order of importance: structure, activities and, last, control. Eisenmann too,[19] noting the similarity to definitions used in the nineteenth-century French treatises of Jèze[20] and Duguit[21], describes the 'classic' tradition of French administrative law as concerned with 'all the special rules relative to the functioning of the public services'. In other words, the structuring and systematisation of the administration and administrative processes take precedence over control and more especially over external control by courts, typically seen as antipathetic to the bureaucratic enterprise. Thus Delvolvé deplores[22] the extent to which 'the importance of the judgements of the Conseil d'Etat in the elaboration of administrative law has led to the equation of administrative law with the law created by the administrative judge'. He regards the conflation as misleading and stresses the importance of other sources, primarily codification but increasingly 'constitutional and international norms'.

Clearly the French Conseil d'Etat was from the outset positioned so as to define administrative law by reference to the administration or public service over which it was steadily assuming jurisdiction, while its institutional position

---

[16] See G. Frug (1984) "The Ideology of Bureaucracy in American Law" *Harvard Law Review*, 97, 1277, though Frug, who classifies administrative law into four ideal-types, groups instrumentalist theories under the 'model of expertise', a term with special resonance in the EC context (see below). Loughlin, above note 15, calls them 'functionalist'. See also M. Loughlin, "The Pathways of Public Law Scholarship" in Geoffrey Wilson (ed.) (1995) *Frontiers of Legal Scholarship*, New York, John Wiley. Harlow and Rawlings, above note 2, use the label 'green light theory', which could prove misleading here.

[17] See the seminal work of K.C. Davis (1969) *Discretionary Justice: a preliminary inquiry*, Louisiana State University Press.

[18] C. Debbasch (1976) *Institutions et droits administratifs, Paris*, Presses Universitaires de France, p. 17. Compare J. Griffith and H. Street (1965) *Principles of Administrative Law*, London, Pitman (3rd ed.).

[19] C. Eisenmann (1982) *Cours de droit administratif*, Paris, Librairie Générale du Droit et de Jurisprudence, vol.1, 17.

[20] *Les principes généraux du droit administratif*, Paris, 1926 (3rd ed.).

[21] L. Duguit (1926) *Leçons du droit public général*, Paris, Boccard ; *Traité du droit constitutionnel* , 5 vols., Fontemoing (3rd ed.) 1927-30.

[22] P. Delvolvé (1994) *Le droit administratif*, Paris, Dalloz, 3.

at the heart of French government had an effect on the concept of administrative law developed by scholars. In this way we see that the predominant tradition of administrative law is necessarily shaped by historical experience and culture. In most European countries, administrative law developed over a period starting in the late nineteenth century. In most European countries too, the constitutional context was one over which the eighteenth-century notion of separation of powers exerted a considerable influence, though to a different extent and in very different versions. To illustrate, the emergence of a distinct public law system in France was organically linked to historical experience, crystallised in Article 13 of the celebrated Law of 16-24 August 1790, which barred the competence of the civil courts in administrative matters.[23] This forms the background to, and starting point of, French administrative law.[24] At least after it had emerged as a significant constitutional force in France, a strong and systematised public law was the predictable outcome of the separate jurisdiction of the Conseil d'Etat. In contrast, in England, the ideology of liberalism which dominated throughout the formative nineteenth century, together with the institutional strength of the judiciary established after the Revolution of 1688, led to the installation of a unitary jurisdiction. In this institutional framework, protection of private interests seemed as natural as the dominance of the Diceyan version of the rule of law ideal.[25]

In reading what follows, it is important, however, always to bear three things in mind. First, while in any given system one tradition may dominate, each is likely to be represented. Thus we should be careful not to deduce that the protection of private interests has no place in French administrative law. Eisenmann indeed marks[26] the existence of both traditions in France, surmising that the split 'seems to reflect different views of administrative law, perhaps even a different vision'. The same is true of common law jurisdictions where alternative, instrumentalist, traditions exist in both Britain and the United States, evolving in the wake of American 'New Deal' politics.[27] Secondly, we must remember that these are not the sole theoretical approaches to administrative law. To mention possible alternatives, a model of rational

[23] J-L. Mestre (1985) *Introduction historique au droit administratif* , Paris, Librairie Générale de Droit et Jurisprudence.

[24] Thus A. de Laubadère (1967) *Manuel de droit administratif*, Paris, Librairie Générale de Droit et de Jurisprudence (8th ed.), p. 5, who adopts an intrumentalist definition of administrative law as 'the law applicable to the administration', goes on to devote his first chapter to judicial control by the administrative judge which he describes as 'the basis' of French administrative law.

[25] J. Allison (1996) *A Continental Distinction in the Common Law, A Historical and Comparative Perspective on English Public Law*, Oxford, Clarendon. See also, Loughlin, above note 15, Chap. 7.

[26] Above, note 19. The alternative tradition in France is especially connected to the name of M. Hauriou whose (1927) *Précis du droit administratif et du droit public*, Paris, Sirey (11th ed.) is equally a classic of French administrative law.

[27] Harlow and Rawlings, above note 2, 68-75.

decision-making and reasoned adjudication has become influential in modern Anglo-American administrative law,[28] while the American 'civic republican' tradition has been adapted as a possible model for EC law.[29] Third, the French and English systems to which I have so far turned for examples are not representative of every national tradition. Scandinavian societies, for example, provide a classic case of administrative law systems in which a litigation culture has been slow to develop [30] and in which the ombudsman has emerged as the primary means of redress for citizens suffering injury by the administration.

To sum up, definitions are not, as is sometimes supposed, purely descriptive and neutral. They form part of a larger political discourse and reflect ideology and political persuasion. Similarly, administrative law systems develop within a constitutional context and culture which influences their development and in which typically they are deeply embedded.

(c) Community, Culture, and Context

In contrast to national legal systems, the emergent systems of law and governance in the Community lacked both culture and constitutional context. The institutional world of Europe has always been inchoate and remains in a situation of constant flux revolving around inter-governmental conferences. Evolving as an international organisation, the Community has never become a state,[31] though it possesses some statal characteristics. The Treaties, described by some as a constitution, undergo a constant process of change. The Member States cannot decide whether they are moving towards, or away from federation, whether Europe will emerge as a Union or a Community of nations.[32] Significantly too when control theories are considered, the Community possesses no independent or developed concept of citizenship, a matter of the utmost concern.[33] Perhaps more significant still, the EC professes democracy without being democratic. Thus the fragility of its political

---

[28] C. Harlow (1995) "A Special Relationship? The American Influence on English Public Law", in I. Loveland (ed.), *Lessons from America*, Oxford, Clarendon; Harlow and Rawlings, above note 2, 100-118; P. Craig (1990) *Public Law and Democracy in the United Kingdom and the United States of America*, Oxford, Clarendon, 1990.

[29] P. Craig (1997) "Democracy and Rule-making Within the EC: An Empirical and Normative Assessment", *European Law Journal*, 3, 105.

[30] J.A. Jensen (1997) "Judicial Review of Legislative Acts", *European Public Law*, 3, 295 and for Sweden, see H.H Vogel (1997) "Swedish Administrative Law in a State of Change", *European Public Law*, 3, 26-30.

[31] ECJ, Opinion 2/94 of 28 March 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

[32] See, J. Weiler (1981) "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law*, 1, 267.

[33] J. Shaw (1997) "European Union Citizenship: the IGC and Beyond", *European Public Law*, 3, 413.

institutions, inherently perilous, necessarily reflects on the legitimacy of its legal order, while the constitutional balance intrinsic to the separation of powers ideal is dangerously absent. In other words, while in every Member State the administrative law system forms part of a working democracy, this is not the case in the Community.

But even if it was not born into a recognizable legal culture, the infant legal order was quick to develop one. The pervasive ideology of market embodied in the 'four freedoms' swiftly gained overriding constitutional status.[34] Integrationism, characterised by an eminent judge as 'a genetic code transmitted to the Court of Justice by the founding fathers',[35] shaped the mindset of the Luxembourg judges. With Van Gend en Loos,[36] the doctrine of supremacy took shape, to assume the character of a primary law on which secondary principles could be, and soon were, predicated.

Where were these principles to come from? The cursory guidance given to the Court in EC, Art. 215 suggested that, with respect to the legal liability of the Community institutions, the common legal heritage of the Member States should be invoked. This may have been the case at first (as with the audi alteram partem principle of English law[37] or the German proportionality principle[38]). They were, however, rapidly to lose their derivative character and assume by a careful process of selection the shape most fitted to the needs of the Community legal order. The turning point, given the limited scope of EC, Art. 215, which makes reference only to the non-contractual liability of the Community institutions and servants, had been the wider application of the axiom. Here the Court of Justice followed French administrative law down the path first of formulating general principle and second, of awarding it semi-constitutional status.[39] For Schwarze, the process has been consistent:[40]

---

[34] E-J. von Mestmacker (1994) "On the Legitimacy of European Law", *RabelsZ*, 58, 617.

[35] F. Mancini and D. Keeling (1994) "Democracy and the European Court of Justice", *Modern Law Review*, 57, 175-86.

[36] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[37] Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063. See generally, J. Schwarze (1992) *European Administrative Law*, London, Sweet and Maxwell, from p. 1434.

[38] *ibid.*, from 855.

[39] For development in the Court of Justice, see A. Lorenz (1964) "General principles of law: their elaboration in the Court of Justice of the European Communities", *American Journal of Comparative Law*, 12; A. Akehurst (1981) "The Application of General Principles of Law by the Court of Justice of the European Communities", *British Yearbook of International Law*, 52, 29. For the previous French experience, which proved seminal, see M. Letourneur (1951) "Les principes généraux dans la jurisprudence du Conseil d'Etat", *Etudes et Documents du Conseil d'Etat*, 19.

[40] J. Schwarze (ed.) (1996) *Administrative Law under European Influence*, Sweet & Maxwell/Nomos, 17 (emphasis mine). See also Y. Galmot (1990) "Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes", *Revue française du droit*

> Looking at the method chosen by the Court for developing a European administrative law, it becomes clear that the law of the Member States has served as a reservoir and source of knowledge. Using the method of an evaluative comparison of the national legal principles, jurisdiction (sic) has regularly tried to find the solution that is most compatible with the legal order of Community law and that most closely corresponds to the functional capacity and the goals of the Community

To put this rather differently, while the Community legal order borrowed principles, they were interpreted in the light of a wholly different mindset and set of objectives.[41] New and original principles, such as the fidelity principle derived from EC, Art. 5 or the notion of a 'level playing field' of rights for Community citizens premised on the controversial doctrine of 'direct effect', began to emerge.

Since both the judicial system and its procedure were modelled on French precedent,[42] the emergent EC administrative law system was, if anything, 'genetically programmed' towards instrumentalism, the definitions, theoretical structure and even, perhaps, predominant mindset of which could have been expected to prevail. There were, however, significant countervailing tendencies.

First, the ideology of market permeates the Treaties and informed the Commission. The Commission was neither a classic department nor a supra-national administration but resembled, and was intended to function as, a regulatory agency, standing between public and private sectors. Second, both Court and Commission were infused by the dominant ideology of integrationism. They shared a common perspective, and a closer alliance evolved than is customary in the Member States. While in respect of direct acts of Community administration (i.e., administrative processes operated directly by the Commission), the respective roles of Commission and Court at first sight resemble those found inside many national systems, on closer examination the role of the Court has been less peripheral than is normally the case with a more self-confident and established public service under the control of a determined executive. A partial explanation must be the absence of settled practices and a body of administrative custom to draw on, though here again, the influence of the French model, where a close relationship between administration and administrative judge is institutionalised, should not be under-rated. On the other hand, we must note as a third significant reason for failure to embed an instrumentalist mindset, the absence at EC level of the jurisdictional divide between private and public law which had proved so formative in France.

---

administratif, 6, 254-260.

[41] See R. Dehousse (1994) "Comparing National and EC Law: The Problem of the Level of Analysis", *American Journal of Comparative Law*, 42, 761-7.

[42] M. Lagrange (1978) "La Cour de justice des Communautés européennes: du plan Schuman à l'Union européenne", *Revue Trimestrielle de Droit Européen*, 14, 2.

A fourth reason lies in the arrangements for judicial review. Individual access to the Court of Justice is strictly limited by the standing requirements of EC, Art. 173, which requires that interest to sue must be both direct and individual. The Court has found a way round this problem in the doctrine of 'direct effect', which permits individuals to sue in national courts. Access to the Community legal order for individuals is then ensured by insistence on the use by national legal orders of preliminary reference procedure of EC, Art. 177.[43] Not only did this development heighten the role of individuals in a system originally arranged for states and institutions but it also moved to centre stage the protection of individuals as an objective for EC law: a switch of objectives, if you like, from instrumentalism to control.

Fifthly and finally, a balance may have been provided by Member States with radically different traditions, notably Germany, whose public law tradition differs sharply from that of France.[44] As Brenner (admittedly somewhat obscurely) opines:[45]

> ... the principle of lawfulness of the administration and the implementation of administrative judicial protection are inseparably related by the ribbon of the principle of the due course of law. It is only by court control that the law is binding for administrative acts with the necessary efficiency as required by lawfulness. Therefore scepticism, as observed in many European countries in the past, e.g., in Great Britain, towards administrative jurisdiction, was not easy to understand, at least from the German point of view.

Perhaps then the sharp shift of EC law towards this position should be interpreted as a victory for German public lawyers. Schwarze's influential body of work on European administrative law is certainly court-centred. Scattered throughout his writing, one can trace his perception that EC administrative law is increasingly created by Commission rules, practices and procedures, emerging through regulation of public procurement and other economic activity. His major treatise,[46] however, focuses on judge-made principles, failing significantly to draw any distinction between constitutional and administrative law. Here the author reflects the early jurisprudence of the Court of Justice and perhaps also a German prototype, where the Basic Law helps to

---

[43] See for discussion, H. Rasmussen (1980) "Why is Art. 173 Interpreted Against Plaintiffs?", *European Law Review*, 5, 114.

[44] For the anti-discretion bias of German administrative law, see G. Nolte (1994) "General Principles of German and European Administrative Law - A Comparison in Historical Perspective", *Modern Law Review*, 57, 191. On the influence of the Basic Law, see K. Goetz and P. Cullen, "The Basic Law after unification: continued centrality or declining force?" in P. Cullen and K. Goetz, (eds) (1995) *Constitutional Policy in a Unified Germany* , London, Frank Cass.

[45] M. Brenner (1997) "Administrative Judicial Protection in Europe: General Principles", *European Review of Public Law*, 9, 595-8. (emphasis mine).

[46] Translated from the German as J. Schwarze (1992) *European Administrative Law*, London, Sweet and Maxwell.

infuse citizens' rights, entrenched at constitutional level, through the different levels of governance.

To summarise, the striking emphasis on jurisprudence, seldom critically examined by commentators; the conceptual, dogmatic, or 'thin' version of the Rule of Law theory which infuses the Court's doctrine of legal equality; the Court's prioritisation of judicial remedy in the name of the Rule of Law; are all symptomatic of classic control theory. In the absence of any strong theoretical literature, however, the stance often has to be inferred. An important article on procedural rights, for example, states[47] that 'the identification of the relevant general principles of law and their translation into concrete rules which govern administrative proceedings are to a large extent tasks for the Community courts'. This is not questioned or seen as contentious.

This is not to say, however, that the Court's operation of its traditional control function has on every occasion been strict enough to satisfy the more extreme of the 'control theory' commentators, who tend to see the Commission/Court relationship as closer than it should be. The Commission's influence on the jurisprudence of the Court is unquestionable. It is represented in all but a handful of cases before the ECJ and its legal service prepares written observations. There is considerable interchange too in the personnel of the two institutions. This helps to ensure that the Commission is strategically placed to influence legal policy and may help to explain also the findings of a recent study[48] that Commission written observations provide a correct prediction of the final outcome of cases in 83% of Art. 177 preliminary references - a somewhat surprising finding when we remember that Art. 177 references concern the dovetailing of EC and national law.

The Court of Justice has nonetheless been criticised for being less protective of the 'citizen' than the Court of Human Rights in cases concerning the 'rights of the defence' in the administrative process.[49] When the

---

[47] K. Lenaerts and J. Vanhamme (1997) "Procedural Rights of Private Parties in the Community Administrative Process", *Commnon Market Law Review*, 34, 531 (emphasis mine).

[48] A. Stone Sweet and T. Brunell (1997) "The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-1995" , Harvard Jean Monnet WP 14/97, Harvard Law School.

[49] See, e.g., Cases 47/87, 227/ 88 *Hoechst v Commission* [1989] ECR 2859; Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137; Case 374/87 *Dow Chemicals Iberia v Commission* Cases 87-99/87 [1989] ECR 3165; *Orkem v Commission* [1989] ECR 3283 noted S. Flogaitis (1992) "Droits fondamentaux et principes généraux du droit administratif dans la jurisprudence de la Cour de justice - trois arrêts en matière de concurrence", *Revue européenne de droit public*, 4, 291. For comparison, see *Funke v France* [1993] *EHRR*, 15, 297, noted with similar jurisprudence from the Court of Human Rights by A. Sherlock at [1993] *European Law Review*, 465- 468, where the same point is made. See also, R. Brent (1995) "The Binding of Leviathan - The Changing Role of the European Commission in Competition Cases", *International and Comparative Law Quaterly*, 44, 255. For further consideration see C. Harlow (1996) "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the

Commission's regulatory powers are in issue the Court has tended to pay regard to the 'objectives of general interest' pursued by the Commission.[50] The competing stances are neatly encapsulated in the Technische Universitat case,[51] involving the rights of the defence before a technical committee. A gross error had been made by a committee of experts advising the Commission in assessing liability to customs duty for the import of an expensive telescope. The university appealed and a preliminary reference reached the Court of Justice. The Advocate-General thought a hearing before the committee unnecessary: 'Having regard to the number of decisions that have to be taken, one must be wary of placing on the administration an excessive burden by insisting on a time-consuming procédure contradictoire'. On this occasion, the Court, however, stood firm, ruling:

> The right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances, and, where necessary on the documents taken into account by the Community institutions.

A more cogent example involves the Court's lenient attitude to the Commission in its use of the power to bring defaulting Member States before the Court under EC, Art. 169. Here the Court has allowed the Commission a wide margin of discretion. The point arose in an early case where Lord Bethell MEP, Chairman of the Freedom of the Skies Campaign, tried to re-open a Commission decision not to pursue Member States over air fare cartels. His action was ruled inadmissible for want of standing under EC, Art. 173, on the ground that, as he was not the addressee of the decision, he was not individually and directly affected.[52] The Advocate-General was clearly uncomfortable with the position and indicated the need for a wider right to challenge Commission discretion, (which still remains unchallengeable). This could, of course, be read as an instrumentalist tendency on the part of the Court of Justice, anxious to leave room for negotiation between the Commission and defaulting Member States over non-compliance.[53] It could, on the other hand, be read as a failure to stimulate the growth of a necessary public interest action in EC administrative law and bring out into the open for investigation possibly suspect dealings between the Commission and other powerful actors on the transnational political scene.[54]

We have seen that classic control theory sees the role of courts and

---

Foot", *European Law Journal*, 2, 3.

[50] See, e.g., Case 4/73 *Nold v Commission* [1974] ECR 491.

[51] Case C 269/90 *Hauptzollamt Munchen-Mitte v Technische Universitat Munchen* [1991] ECR I-5649. See further below, text at note 77.

[52] Case 246/81 *Lord Bethell v Commission* [1977] ECR 2277.

[53] See, F. Snyder (1993) "The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques", *Modern Law Review*, 56, 19.

[54] C. Harlow (1992) "Towards a Theory of Access for the European Court of Justice", *Yearbook of European Law*, 12, 213.

administrative law as the protection of the citizen or individual against the state. When this idea is translated into the usage of Community law, however, we have to note two significant twists. In practice, the direct relations of the Community institutions with citizens are limited; typically, the Community operates through the institutions of the Member States while its competence remains limited and centres around the Single Market. The consequence is twofold. On the one hand, the 'individual' to whom reference is constantly made in the context of debates over rights, human rights and EU citizenship, is in practice usually a corporate body.[55] On the other hand, the 'state' against which the 'citizen' typically merits protection under EC law is, strangely, the Member State, while the wrongful act or illegality in respect of which protection is granted is a disregard of EC law. To put this differently, the direct interface between citizen and state is replaced in EC law by a triangular relationship, while the dualist character of the EC legal order, which requires the ECJ to operate through national courts, further transforms the character of administrative adjudications. There are obvious sources of tension here, opening the Court of Justice to charges of partiality in imposing on Member States standards of conduct not expected of the Commission and Community institutions.

A notable illustration of this point is provided by the controversial jurisprudence on state liability. As indicated above, under EC, Art. 215, the Community institutions can be liable for loss caused through their acts and activities. The rules devised by the Court of Justice, supposed to be patterned on the law of the Member States, are generally regarded by commentators as restrictive, more especially in cases concerning acts of a legislative character [56]. Francovich[57] dealt with the different case of a Member State, whose failure to incorporate a directive on compensation of redundant employees had ultimately resulted in loss to the applicants. It is sufficient to say that the Court imposed a duty to compensate on defaulting Member States. The judgement provoked criticism, however, in that it seemed to apply a higher standard of liability to Member States found to be in breach of the obligation to incorporate EC law correctly into the national legal system than on the Commission for loss caused by invalid or illegal activity. This differential treatment was actually justified in later cases by the Court's Advocates-General, at least one of whom refused to see any parallel between the situations.[58]

---

[55] See text at note 117 below.

[56] T.C. Hartley (1994) *The Foundations of European Community Law*, Oxford, Clarendon (3rd ed.) 470-507; H. Bronkhorst (1988) "The Valid Legislative Act as a Cause of Liability of the Communities" in H. Schermers, T. Heukels and P. Mead (eds) *Non-Contractual Liability of the European Communities*, The Hague, Martinus Nijhoff, 13.

[57] Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357.

[58] Opinion of Advocate General Lomas in Case 5/94 *R v Ministry of Agriculture and Fisheries ex p. Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553, paras. 101.2 and 142.3. In Case C 46/93 *Brasserie du Pêcheur SA v Germany* [1996] QB 404 (paras. 61, 67), A-G Tesauro is more circumspect, calling the argument 'not completely baseless'. An unusually mixed reaction may have led the Court to backtrack in later cases, which go some way to iron out the discrepancy in

Further problems arise as the relations of citizens with national administrations become destabilised through contact with the EC system. Horizontal equality is then endangered; i.e., in similar situations, the rights of citizens under national and EC law may differ. In a number of highly publicised cases, rules of national administrative law have been forced to give way before the 'superior' legal order. In Johnston,[59] for example, a national statutory ouster clause had to bow before the 'general principles' of EC law; in Emmott,[60] a time limit had to be disregarded when its effect was seriously to inhibit judicial protection of EC rights; while in Factortame[61] a statutory provision which stood in the way of an interim remedy was disapplied. A situation had developed in which national administrative law and - more important - constitutional law might have to bend in response to the wholly different ethos, culture and requirements of the advancing Community legal order. In this way, the constitutionalisation of basic administrative procedures as 'general principles of Community law' allows them to be diffused through national administrations, a development already noted. Thus the Heylens case[62] established (i) a general principle of effective judicial protection and (ii) a duty to inform parties to an administrative decision of the reasons for that decision. The formulation suggested that the procedures themselves possess constitutional weight, a tendency no doubt encouraged by the fact that EC, Art. 190, embeds the right to reasoned decisions into the Treaty. We then find the commentators unquestioningly describing the rights of the defence as 'principles of higher rank which prevail over all other rules'.[63]

The right to a judicial hearing established by Heylens and Johnston is protected in parallel by ECHR, Art. 6(1)[64] and the expansive jurisprudence of the Court of Human Rights. This, as Abraham has observed[65], threatens to absorb the major part, if not the whole, of administrative decision-making,

---

standards: see especially Case C-392/93 *R v HM Treasury ex p British Telecommunications* [1996] ECR I-1631.

[59] Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.

[60] Case C- 208/90 *Emmott v Minister for Social Welfare* [1991] ECR I-2925. Once again, later cases backtrack: see, e.g., Case C-188/95 *Fantask A/S and others v Industriministeriet (Ehrvervsministeriet)* 2 December 1997, Bulletin No 33/97, 3.

[61] Case 221/89 *R v Secretary of State for Transport ex p Factortame (No 3)* [1991] ECR I-3905 and [1991] 1 AC 603.

[62] C 222/86 *UNECTEF V Heylens* [1987] ECR 4097.

[63] Lenaerts and Vanhamme, *op. cit.* note 47. And see R. Lanwaars (1994) "Rights of the Defence in Competition Cases", in D. Curtin and T. Heukel (eds) *Institutions and Dynamics of European Integration*, The Hague, Martinus Nijhoff, vol. II, 506.

[64] Art. 6(1) provides: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[65] R. Abraham (1997) "Les principes généraux de la protection juridictionnelle administrative en Europe: l'influence des jurisprudences européennes", *European Review of Public Law*, 9, 577.

expanding from adjudicative procedure into the administrative process and collapsing the established boundary between penal and administrative proceedings - a perverse and unintended consequence of the Article!

In briefly chronicling these developments, we can see the focus of European administrative law shifting to and fro. As Schwarze observes,[66] initially interest lay in the construction of a system of administrative law for the Community; in other words, a system applicable to Community institutions and Community administrative procedures. Today, harmonisation and integration of national systems has moved rapidly up the agenda. Though he does not give this development whole-hearted approval, Schwarze clearly regards it as inevitable. In the light of the emphasis placed on the concept of subsidiarity in the Maastricht Treaty,[67] this viewpoint is clearly challengeable. It must be said also that the development needs much more careful consideration than it is currently receiving from academics. We may be on a course damaging to the institutions, structure and culture of national constitutional and legal systems. In detaching administrative law too fast from its cultural environment, harm may be caused to the structure of national constitutions, legal orders and administrative systems. This will inevitably impact on the Community legal order and administrative process, undercutting the pillars on which the Community stands. There is a further risk that the search for a single model of administrative justice will produce stagnation, impoverishing our different legal traditions and draining the pool of ideas for experimentation.[68]

II. FUTURE IMPERATIVES

(a) Regulation and Control

The starting point for a more detailed consideration of EC administrative law must be its institutional context. As already indicated, the Commission differs from typical national administrations, which operate against strong political systems and inside a separation of powers culture. It lacks sizeable bureaucratic resources and depends heavily for implementation on national and regional administrations and on agencies in the Member States. Consequently, it has emerged as a policymaker or policy entrepreneur[69] with a strategic position in the lawmaking process guaranteed by its right of initiation (EC, Art. 155). The best analogy, as already suggested, is to a regulatory agency, possessing a typical mix of rulemaking and enforcement powers. It could be seen as a bundle

[66] J. Schwarze (ed.) (1996) *Administrative Law under European Influence*, London, Sweet & Maxwell/Nomos, 14-6.

[67] TEU Art. G(5) inserting new EC Art. 3(b), soon to become ToA Art. 5.

[68] Abraham, *op. cit.*, note 65.

[69] B. Laffan (1997) "From policy entrepreneur to policy manager: the challenge facing the European Commission", *Journal of European Public Policy*, 4, 422. See also, T. Christiansen (1996) "A maturing bureaucracy? The role of the Commission in the policy process" in J. Richardson (ed.) *European Union: Power and Policymaking*, London, Routledge.

of regulatory agencies represented by the DGs. Separate agencies are just beginning to be added. Derived from EC, Art. 235, these have legal personality and are semi-independent of the Commission.[70] As yet the majority possess only advisory functions but, as and when they evolve towards true regulatory agencies, they will present similar accountability problems.

In Majone's regulatory state, traditional conceptions of 'control' are seen as inappropriate. For Majone, control occurs through 'self-policing mechanisms which are already present in the system'. This means building:[71]

> a network of complementary and overlapping checking systems instead of assuming that control is necessarily to be exercised from any fixed place in the system'.

The control systems envisaged by Majone are: 'oversight by specialised congressional committees, presidential power of appointment, strict procedural requirements, professional standards, public participation and judicial review'.

Based on an American model, most of these controls are notably absent in the Community; it is indeed precisely for this reason that judicial power has assumed such a significance. We know from the American experience that a combination of strict procedural requirements with over-extensive judicial review has led to a stalemate situation from which American administrative law is just beginning to retreat.[72] Significantly, Shapiro has predicted[73] a parallel move to judicialisation of EC administrative procedures, based largely on the reasons requirement of EC, Art. 190, a development rendered more likely by the market culture described earlier. (This point is developed below).

(b) Rulemaking procedures

At national level, accountability for lawmaking functions is through the democratic process, a pattern which in practice tends to disguise the administrator's role as policymaker and draftsman. The democracy deficit of the Community means that the customary parliamentary control has been

---

[70] See, A. Kreher (1997) "Agencies in the EC - a step towards administrative integration in Europe", *Journal of European Public Policy*, 4, 225; M. Everson (1995) "Independent Agencies: Hierarchy Beaters", *European Law Journal*, 1, 180.

[71] G. Majone (1996) *Regulating Europe*, London, Routledge, 39. The theory of 'interpolable balance' presented there is borrowed from C. Hood, "Concepts of control over public bureaucracies: 'comptrol' and 'interpolable balance'" in F-X. Kaufman et al. (1991) *The Public Sector*, Berlin, de Gruyter, 347-66.

[72] For diverse assessments see M. Shapiro (1986) "APA: Past, Present and Future" *Virginia Law Review*, 72, 447; R. Pierce Jr. (1996) "Rulemaking and the Administrative Procedure Act", *Tulsa Law Journal*, 32, 185; B. Schwartz (1996) "Adjudication and the Administrative Procedure Act", *Tulsa Law Journal*, 32, 203.

[73] M. Shapiro (1996) "Codification of Administrative Law: the US and the Union", *European Law Journal*, 2, 26 and M. Shapiro (1992) "The Giving Reasons Requirement", *University of Chicago Legal Forum*, 179.

weakened. To date, the response to democracy deficit has been to demand a stronger European Parliament.[74] An instrumentalist approach to the EC lawmaking process, given the Commission's central place and acknowledged function as policy innovator, would be to deal with all Commission rulemaking as analogous to executive rulemaking powers in France, where rulemaking is treated as a legitimate ancillary to the administrative function, independent from the rulemaking powers of the legislature, and subject to control by the administrative judge.[75] This would on the one hand justify close scrutiny by the Court and, on the other, encourage innovation and experiment by the Commission.

The Comitology, nominally the Council's representative in Commission lawmaking procedures but actually a prime example of bureaucratic capture - a forum in which Community civil servants meet those of the Member States - needs to be made more transparent and accountable.[76] The Technische Universitat case mentioned above[77] in fact involved a technical committee exercising a quasi-judicial function and not a legislative or advisory committee. The concerns of the Court about accountability are nonetheless directly relevant to the Comitology. In his Opinion, the Advocate-General stressed the need for a technical committee to be both expert and impartial; the dominance of Member State representatives on the committee meant that this criterion had not been met. At national level, the value of expert objectivity might receive less emphasis in view of the political control exercised by an accountable government and the ultimate control of the legislature. In the case of the EU, where political control is limited and where national interests almost inevitably figure, the same cannot be said. Working secretly, the Comitology is an unaccountable technocracy operating at the heart of the Community which is capable of acting unfairly and which needs to be controlled. Standard administrative law values of openness, impartiality, reasoned and rational decisionmaking should be introduced.

Procedural change to allow for a democratic and collective input into administrative rulemaking is under consideration in many common law countries including the United Kingdom.[78] Transparency, increasingly seen as a

---

[74] Though see R. Dehousse (1995) "Constitutional Reform in the European Community. Are there Alternatives to the Majoritarian Avenue?", *West European Politics*, 18, 118.

[75] CE 6 Dec. 1907 *Cie des chemins de fer de l'est et autres* Rec 913 concl. Tardieu; M. Long et al. (1991) *Les grands arrêts de la jurisprudence administrative*, Paris, Sirey (9th ed.), Case No. 19 and the note thereunder.

[76] E. Vos (1997) "The Rise of Committees", *European Law Journal*, 3, 210; C. Joerges and J. Neyer (1997) "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalistation of Comitology", *European Law Journal*, 3, 273.

[77] Case C 269/90 *Hauptzollamt Munchen-Mitte v Technische Universitat Munchen* [1991] ECR I-5649. Above, text at note 51.

[78] See for the UK (1992) *Making the Law: Report of the Hansard Society Commission on the Legislative Process*, London, Hansard Society; for Australia see, *Rulemaking by Commonwealth Agencies* Report No 35 of the Administrative Review Council (Australian

fundamental democratic value, is rapidly climbing to constitutional level in the European Union[79] with the requirement added to TEU Art. A that decisions be taken 'as openly as possible'. Under the Amsterdam Treaty, a new EC Art. 191a will give citizens a right of access to EP, Council and Commission documents. Dissatisfaction with the slow progress to date has provoked a litigation strategy designed to secure greater openness, though so far without great success.[80]

The Commission has already been experimenting with new ideas designed to allow collective access to the rulemaking process. It publishes proposals on the Web and encourages public comment. The inauguration of a public consultation stage through a 'European public square' is an ingenious idea[81] made possible through the new technology. The Maastricht Social Chapter introduced a new form of rulemaking negotiated by the social partners, which can then be formally adopted by either the Commission or Member States.[82] There is a parallel here to an American introduction. The Negotiated Rulemaking Act[83] aims to bring together interested parties in the initial stages of rulemaking. Once an act is designated for negotiation, a 'convenor' is appointed to facilitate a negotiated outcome which is then referred back to the agency for consideration. The purpose is to avoid the lengthy and convoluted procedures imposed on administration by the courts through the machinery of the Administrative Procedures Act. This suggests that Social Chapter procedures could be considered in other contexts.

(c) Administrative Procedures: Hard or Soft Law?

I have argued elsewhere[84] against general administrative procedure codes in the context of harmonisation of national administrative procedure. Chiti also expresses scepticism,[85] on the basis of respect for national legal and

---

Government Publishing Service, 1992. And see Harlow and Rawlings, above note 2, 165-7.

[79] J. Lodge (1994) "Transparency and Democratic Legitimacy", *Journal of Common Market Studies*, 32, 343; D. Curtin and H. Meijers (1995) "Access to European Union Information: An Element of Citizenship and a Neglected Constitutional Right" in N. Neuwahl and A. Rosas (eds.) *The European Union and Human Rights*, The Hague, Martinus Nijhoff.

[80] Case T-194/94 *Carvel and Guardian Newspapers v. Council* [1995] ECR II-2769; Case C-68/94 *Netherlands v Council*; Case T-105/95 *WWF v Commission* [1997] 2 CMLR 55.

[81] See J. Weiler (1997) "The European Union Belongs to its Citizens: Three Immodest Proposals" *European Law Review*, 22, 150.

[82] S. Fredman (1998) "Social Law in the European Union: The Impact of the Lawmaking Process" in P. Craig and C. Harlow (eds) *The European Lawmaking Process*, Dordrecht, Kluwer.

[83] Pub. Law No. 101-648 (1990), No. 104-320 (1996) 110 Stat. 3870. See also Aman, above note 6, 105-8.

[84] C. Harlow (1996) "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot", *European Law Journal*, 2, 3. See also, M. Shapiro (1996) "Codification of Administrative Law: the US and the Union", *European Law Journal*, 2, 26.

[85] M. Chiti (1997) "Towards a Unified Judicial Protection in Europe (?)", *European Public Law Review*, 9, 553-62.

administrative cultures: 'It is not by chance that some countries have never had a procedural code, and they do not seem to desire to have it'. It is in any case by no means certain that such a code could be implemented given the differing levels and styles of administrative organisation in the Member States. This is not to say that national administrations are not undergoing a process of convergence[86] but, even assuming that the process will one day be completed, it is at present by no means complete. Codification is therefore premature.

The same is probably true of procedure at Community level. In the majority of the areas where the Commission is directly responsible for administration (e.g., competition, state aids or anti-dumping) Commission procedures are well-established and have for a long time been formulated in regulation. Hard law is sometimes a necessity. If public procurement law, for example, really needs to be uniform throughout the Community, it must be incorporated in Community regulation or directive; similarly if, as has been suggested,[87] administrative contract law needs to be harmonised. Certainly the law applicable in contracts with the Commission seems a proper subject for rules debated and published openly to meet standards of good administration.

Yet formal or codified rules constantly have to be rewritten as they become outdated. It has for example been suggested that, because competition procedures date back to EC Reg 17/62, they are 'no longer up to modern procedural standards'.[88] This situation invites the lawgames which are a feature of juridified systems. The more formal the procedure, the harder it is to agree change. A continuous process of litigation and judicial intervention is inaugurated, followed by rule-change triggering further litigation. The French have resolved the problem of rule-change with a standing Commission on Codification at the heart of the French Conseil d'Etat. This is a formula which could perhaps be adopted at Community level, with a Commission working group or committee plus specialist advisers whose task it is to take procedural rulemaking forward.

Rulemaking incites frustrated managers to devise techniques for evasion. The staff procedures of the Commission's own bureaucracy are frequently evaded by the use of short-term contracts - a public/private transformation familiar in NPM.[89] The recent Green Paper on Public Procurement[90] assumed that procedures must be 'transparent', in other words, encapsulated in clear

---

[86] K. Goetz and J. Hesse (1992) "Early Administrative Adjustment to the EC. The Case of the Federal Republic of Germany", *Jahrbuch fur Europaische Verwaltungsgeschichte*, 4, 181.

[87] A. Bleckmann (1992) "Le droit européen communautaire dans la domaine du droit administratif" in B. de Witte and C. Forder (eds), *The common law of Europe and the future of legal education*, Dordrecht, Kluwer, p. 161.

[88] C-D. Ehlermann and B. Drijber (1996) "Procedural Protection of Enterprises: Administrative Procedure. In Particular Access to Files and Confidentiality", *European Competition Law Review*, 7, 375.

[89] M. Freedland (1994) "Government by Contract and Public Law", *Public Law*, 86.

[90] *Public Procurement in the EU: Exploring the Way Forward* 1996 COM (96) 583.

rules. But Arrowsmith argues[91] that this may ultimately paralyse evolution because, under rule-based systems:

> the focus tends to be on compliance with the rules rather than with the quality of results, which can lead to a situation where even within the limited area of discretion open to them, procurement officers engage in unduly cautious behaviour to minimise legal errors.

In areas such as that of state aids, where the Council has been notably reluctant to legislate, 'soft law' has proved the best way forward.[92] Generally, the flexibility of soft law is useful. If unsuccessful it can easily be withdrawn. The regulator also gains discretion in implementation.[93] Soft law can be negotiated and can thus be used as a basis for harmonisation, especially in areas where the Commission shares administrative responsibility with a Member State (e.g., with structural funds, regional grants or the Common Agricultural Policy). Guidelines allow administration of grants to be broadly the same in the various Member States but give sufficient flexiblity to allow the scheme to be properly embedded in national bureaucracies. We must also bear in mind the problems of federal systems and remember that national administration is increasingly being downsized and its tasks downloaded. Soft law allows policies to be operated at regional level, taking account of the particular sensitivity of regions to their own culture and independence. At a later stage, negotiated rulemaking may be able to provide a bridge between informality and formality.

Soft law can also avoid undue judicialisation, though admittedly there is always the danger that courts will intervene to enforce procedures through doctrines of legitimate expectation.[94] Where this principle allows for policies to be withdrawn in terms of due notice, plus an opportunity for any person affected to make representations, it is probably not too harmful. To allow the doctrine to create substantive rights[95] is, however, unwise. It will almost certainly result in defensive administration, designed to avoid the ripple effects caused by the application of individuated judgements to a wide range of other, similar cases.

---

[91] S. Arrowsmith (1997) "The Way Forward or a Wrong Turning? An Assessment of EC Policy on Public Procurement in Light of the Commission's Green Paper", *European Public Law*, 3, 389-401.

[92] G. della Cananea (1993) "Administration by Guidelines: The Policy Guidelines of the Commission in the Field of State Aids" in *Schriftenreihe der Europaischen Rechtsakademie Trier*.

[93] See further, F. Snyder (1994) "Soft Law and Institutional Practice in the European Community" in S. Martin (ed.) *The Construction of Europe, Essays in Honour of Emile Noël*, Dordrecht, Kluwer.

[94] See J. Schwarze (1992) *European Administrative Law*, London, Sweet and Maxwell, 938.

[95] On which see, P. Craig (1996) "Substantive Legitimate Expectations in Domestic and Community Law", *Cambridge Law Journal*, 289.

(d) Accountability and Monitoring

With rulemaking as our point of departure, we have moved the discourse of administrative law sharply inside the parameters of instrumentalist theory. But rules are not in themselves sufficient to ensure a high standard of public administration. The classic nineteenth-century machinery of an independent inspectorate is still the preferred management tool in public service-oriented administrations. In contrast, the preferred technique of NPM to secure this central objective has been contract, closely linked to performance indicators and published standards, while value-for-money audit has been the favoured method of accountability [96]. In this context, EC, Art. 4, inserted at Maastricht, which emphasises the special importance of the Community Court of Auditors and invites 'other Community institutions to consider... ways of advancing the effectiveness of its work' is significant. The Court's main weapon is its special reports, which can be hard-hitting and which may attract an unaccustomed degree of media attention. Whether audit can ever work satisfactorily in a system of low political visibility and debate, in which political accountability is under-developed is, however, a moot point.

Alternative dispute resolution provides an adjudicative parallel to soft law. Maastricht brought the European Ombudsman (EO) on to the European scene.[97] The EO stresses his role in ensuring 'good administrative practices' and has already published a list of practices which he sees as faulty, adding significantly:[98]

> The experience of national ombudsmen shows that it is better not to attempt too strict a definition of what may constitute maladministration. The open character of the term is justly one of the elements which distinguishes the role of ombudsman from that of the court.

The way in which this approach may differ from that of a court can be seen from a group of complaints[99] concerning Commission refusal to use Art. 169 procedure. It has to be said that the number and style of the complaints suggests a determined use of the EO for the type of political lobbying becoming so familiar at national level. All the complaints concerned the United Kingdom's alleged failure to carry out environmental impact assessment before the building of the Newbury by-pass, a matter falling outwith the EO's jurisdiction. They were therefore presented as an attack on Commission procedure. Although the EO was in the event unable to help directly, the outcome was nonetheless important. Examination of the file to ensure that the decision to close it had been taken in conformity with general principles of good administrative behaviour, caused the EO to criticise the procedures for lack of transparency. He also noted the considerable dissatisfaction expressed by

---

[96] See note 2 above.

[97] TEU Arts 8d, 138e; ToA Arts 21, 190.

[98] Annual Report of the European Ombudsman for 1995, 17-8.

[99] *132/21.9.95/AH/EN v Commission re Newbury Bypass*, Annual Report for 1996, 66-7.

'European citizens, some of whom regard the Commission's approach to the discharge of its responsibilities under Art. 169, as arrogant and highhanded'. He asked the Commission to conduct a general examination of the procedural position of individuals in Art. 169 procedure with a view to reform. This is already under way.

It is not of course unknown for the Court to make similar recommendations to the Commission. In Tradax,[100] for example, the Advocate-General advised that the Commission should 'as a matter of good administrative practice, though not as a legal obligation' grant access to pertinent information. Unlike ombudsmen, however, courts cannot follow up their judgements to see them implemented[101] and have no monitoring procedures to trace the ripple effect of their judgements inside the administration. Moreover, they cannot choose their cases. In common with ombudsmen in some Member States, the EO is empowered to act suo moto. Although he expects to utilise this power sparingly, he has announced his intention to use it where multiple complaints 'suggest that a more general inquiry would be appropriate'.[102]

To summarise, one can see the evolution of EC administrative law thus far as a perpetual clash between two sets of values, each in its own way geared towards control, but differing as to the object and manner of control. The traditional constraints imposed by national governments from which commerce and capitalist interests have been freed by globalisation are reinstated by the regulatory institutions of the EC, whose mission is legitimated and facilitated by instrumentalism. The ideology of control, on the other hand, has largely been to the profit of international capitalism, an interest still more strongly embedded in the culture of the Community. Control theory allows Community powers to be emasculated by the very interests the Community set out to regulate. Finally, the intervention of a third dimension special to the Community, the perceived need to prioritise the interests of the new legal order, has pushed EC administrative law off course as control of the state has come to be conflated with control of the Member States.

[100] Case 64/82 *Tradax* [1984] ECR 1359.

[101] This is not true of the French Conseil d'Etat, whose Section du Rapport has the duty to see unimplemented judgements enforced: see Annual Reports of the Conseil d'Etat for details.

[102] Annual Report 1995, 22.

III. LAW'S EXPANDING EMPIRE

Majone has described[103] the exponential growth of EC regulation since the 1960s as 'a major theoretical puzzle'. The only puzzlement is Majone's. The twin techniques of modern public administration have been rulemaking and regulation;[104] the two have, indeed, been described as 'mirror images'.[105] Regulation implies rulemaking and rulemaking is merely one side of the phenomenon of juridification, a term coined to describe the tendency of modern and post-modern societies to formalise and encapsulate all social relations in terms of law.

An alternative way to theorise this phenomenon is as a move from 'trust' societies, in which elite groups are both trusted and trust each other, to a 'grid' society, in which obligations are imposed on individuals by external authorities.[106] Public administration in the modern state, with its mass public services, ranging from revenue raising through grant aid to social assistance, has inevitably veered sharply towards the 'grid' model. The preeminence accorded to the equality principle in modern society has undoubtedly expedited this tendency. Ironically, the Community itself emerged as a 'group' or 'trust' culture, in which actors and institutions were bound together by a shared belief in integrationism and the European enterprise. The advent of the Community has, however, aggravated the trend towards the 'grid' model, both because of the Community's centralising effect and because of its disruptive impact on national policy networks. The implementation of the Single Market programme, the introduction of the Comitology and the mistrust which began to surface around the time of Maastricht, were all factors pushing Community administration towards juridification.

The EC has made its own substantial contribution to juridification. On the regulatory side, an average of 25 directives and 600 regulations per annum in the 1970s rose to 80 directives and 1.5 thousand regulations by the early 1990s, when Brussels actually issued more regulation than France.[107] Merely to incorporate, Member States 'have been forced to develop new regulatory capacities to an unprecedented extent'.[108] There is widespread concern at the effects of over-regulation, which impacts not only on business and economic enterprise - deregulation is high on conservative political agendas - but on law and law's image.[109] It has been suggested that techniques exist to measure the

---

[103] G. Majone (1996) *Regulating Europe*, London, Routledge, 56-9.

[104] R. Baldwin (1995) *Rules and Government*, Oxford, Clarendon.

[105] See, C. Hood and C. Scott (1996) "Bureaucratic Regulation and New Public Management in the United Kingdom: Mirror-Image Developments?", *Journal of Law and Society*, 23, 321.

[106] C. Scott, "The Juridification of Regulatory Relations in the UK Utilities Sectors", conference paper awaiting publication. See also D. Chalmers (1997) "Judicial Preferences and the Community Legal Order", *Modern Law Review*, 60, 164-7.

[107] Annual Report of the Conseil d'Etat for 1993.

[108] Majone, *op. cit.*, p.59.

[109] See R. Cotterell (1992) "Law's Community: Legal Theory and the Image of Legality",

optimum degree of regulation.[110] If this is true - which I doubt - then modern administrative law has got the balance seriously wrong. Goodin describes[111] the search for certainty through rules as a mirage. Rules cannot cure the ills of discretionary power; they replicate many and substitute others. The NPM values of economic, efficient and effective administration require the pendulum to swing back towards discretion. There are signs of a move in this direction: in the course of this article, we have noted the preference for soft law and experiments with negotiated rulemaking,[112] while a closer look at the field of environmental law would reveal a novel form of regulation by contract with private entities.

Courts, whose contribution to juridification may go unremarked, in fact contribute to juridification in two main ways. First, discretion, a central feature of 'trust' systems of public administration, is anathema to control theories of administrative law since it tends to be seen as running counter to the certainty required by the Rule of Law principle. In many systems of administrative law today, control of discretionary power has emerged as a central task for the judiciary.[113] (It is important to note here that 'soft law' is typically classified with discretion). Since rules are seen as the alternative to discretion, judicial intervention stimulates formal rulemaking. Rules in turn incite resort to the courts to interpret verbal ambiguities and resolve borderline cases. The borders may be redrawn. This possibility encourages the growth of more specific and complex rules, which in turn produce interpretative problems to be referred to courts. The doctrine of direct effect, which encourages detailed provisions in directives so that Member States can know the terms of the bargain to which they may be deemed to have consented, is a further encouragement to juridify. In short, the cycle of juridification is well under way in EC administrative law.

The second major contribution of courts to juridification comes through the procedural requirements of 'due process'. To control theorists, for whom courts are at the centre of administrative law, the ECJ is seen as the creator of a sophisticated and novel system of procedural protection. But the iron grip of the judicial hand can quickly become adamantine. Proceduralism is today firmly embedded in Community administrative law. A trend can be observed for the Court of First Instance (CFI) to conduct a re-hearing of Commission cases. In the celebrated 'Soda Ash' cases, the CFI stated that 'infringement of the rights of the defence must... be examined in relation to the specific circumstances of each particular case'. It went on to do precisely this, effectively granting the applicants a rehearing on the merits. Ehlermann and Djriber have observed with dismay[114] how, in the heavily litigated area of

---

Journal of Law and Society, 19, 405.

[110] See J. Black (1995) "'Which Arrow?': Rule Type and Regulatory Policy", *Public Law*, 94.

[111] R. Goodin (1986) "Welfare, Rights and Discretion", *Oxford Journal of Legal Studies*, 6, 232.

[112] Above, text at note 83 and II c

[113] See Harlow and Rawlings, above note 2, Chap. 4; Nolte, above note 44.

[114] C-D. Ehlermann and B. Drijber, above note 88.

competition law, more time is spent on the question whether the Commission has followed a proper procedure to reach a decision than on the merits of the case itself. Through human rights law and through the constitutionalisation of administrative procedures discussed above, trial-type procedures are rapidly permeating downwards inside administration. If this process continues unchecked, the outcome must be a further transmutation of the Rule of Law ideal into sterile proceduralism.

It has to be remembered that we are by and large operating in the specialised area of administrative economic law, a point which commentators often overlook. This is a sensitive and problematic area which borders on (or may overlap with) that of 'white collar crime' and mirrors some of the difficulties experienced there.[115] The area is one ripe for litigation. The sums at stake may be enormous; the players have much to lose; they have access to first class legal advice, often in-house; legal costs are merely transaction costs; and delay is usually a gain. Studies of the ECJ docket show it to be dominated by corporate bodies.[116] Galanter[117] blames American business practices, with their 'styles of structuring business rules, drafting contracts, regulating financial markets and protecting injury victims', for infecting the international legal environment with the potent American litigation culture. Litigation is itself a form of juridification to which the EC system has already capitulated. Litigation is rising steadily and with it, delay.[118] Whatever the causes, and we must not discount the entry of new states, any serious increase in caseload will necessitate changes to both structure and procedures of Community justice.[119] Yet resort to the courts still receives active support from the jurisprudence of the ECJ - through its encouragement of Art. 177 references; through the doctrine of direct effect, an explicit encouragement to litigate; and through the Francovich principle of state liability.[120] Serious work on alternative dispute resolution, though clearly necessary, seems to be entirely missing from the

[115] See Chap. 3, "The Fair Trial Guarantees" in M. Delmas-Marty (ed.) (1996) *What Kind of Criminal Policy for Europe?*, Dordrecht, Kluwer Law International.

[116] C. Harding (1992) "Who Goes to Court in Europe? An Analysis of Litigation against the European Community", *European Law Review*, 17, 105; F. Fines (1988) *Etude de la responsabilité extra-contractuelle de la Communauté*, Paris, Librairie Générale de Droit et de Jurisprudence, Annex II, 426-49.

[117] M. Galanter (1994) "Predators and Parasites: Lawyer-Bashing and Civil Justice", *Georgia Law Review*, 28, 633-74.

[118] Statistics published annually by the Court show that, in 1992, the ECJ handled 251 direct actions and 162 preliminary references with average delays of 25.8 and 18.8 months. The CFI, instituted to lessen the Court's burden, handled 36 actions with an average delay of around 23.3 months. In 1996, the relevant figures were: ECJ, 132 direct actions and 256 references with delays of 19.6 months for direct actions and 20.8 for references. The right of appeal had added 14 months. The CFI handled 122 actions (no figures are given for delay).

[119] J-P. Jacqué and J. Weiler (1990) "On the Road to European Union - A New Judicial Architecture. An Agenda for the Intergovernmental Conference", *Common Market Law Review*, 27, 185.

[120] Above note 57.

agenda.

Majone's regulatory state is evolving in a direction as impersonal as it is undemocratic. Do we really wish to live in a juridified society where every relationship is governed by rules and where litigation is all-pervasive? Moreover, it is not - as Majone suggests - the function of administrative law to secure accountability. That is to usurp the role of democratic politics. Law cannot fill the void created by the absence of democratic politics nor can the democratic deficit of the Community be filled by judges. The path to juridification down which we are hastening seems likely to make things worse. The political deficit has added judges to the neo-corporatist network of actors - regulators, international businessmen, bureaucrats and politicians - who dominate post-modern governance. Simply to reconstruct the trust society is not, of course, an option. Laying the foundations of a real political Community with a rich and plural political discourse will not be easy. It is, I believe, the only way forward.

EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge
– depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI) – Italy
Telefax No: +39/55/4685 636
e-mail: publish@datacomm.iue.it
http://www.iue.it

From

Name .....
Address.....
.....
.....
.....
.....

❒ Please send me a complete list of EUI Working Papers
❒ Please send me a complete list of EUI book publications
❒ Please send me the EUI brochure Academic Year 1998/99

Please send me the following EUI Working Paper(s):

No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....

Date .....

Signature .....

Working Papers of the Robert Schuman Centre

Published since 1998

RSC No. 98/1
Jonathan GOLUB
Global Competition and EU Environmental Policy. *Global Competition and EU Environmental Policy: An Overview*

RSC No. 98/2
Ian H. ROWLANDS
Global Competition and EU Environmental Policy. *EU Policy for Ozone Layer Protection*

RSC No. 98/3
Marc PALLEMAERTS
Global Competition and EU Environmental Policy. *Regulating Exports of Hazardous Chemicals: The EU's External Chemical Safety Policy*

RSC No. 98/4
André NOLLKAEMPER
Global Competition and EU Environmental Policy. *Improving Compliance with the International Law of Marine Environmental Protection: The Role of the European Union*

RSC No. 98/5
Thomas HELLER
Global Competition and EU Environmental Policy. *The Path to EU Climate Change Policy*

RSC No. 98/6
David VOGEL
Global Competition and EU Environmental Policy. *EU Environmental Policy and the GATT/WTO*

RSC No. 98/7
Andrea LENSCHOW
Global Competition and EU Environmental Policy. *The World Trade Dimension of "Greening" the EC's Common Agricultural Policy*

RSC No. 98/8
Nick ROBINS
Global Competition and EU Environmental Policy. *Competitiveness, Environmental Sustainability and the Future of European Community Development Cooperation*

RSC No. 98/9
Thomas RISSE (with Daniela ENGELMANN-MARTIN/Hans-Joachim KNOPF/Klaus ROSCHER)
To Euro or Not to Euro? The EMU and Identity Politics in the European Union

RSC No. 98/10
Véronique PUJAS/Martin RHODES
Party Finance and Political Scandal in Latin Europe

RSC No. 98/11
Renaud DEHOUSSE
European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?

RSC No. 98/12
Jonathan GOLUB
New Instruments for Environmental Policy in the EU. *New Instruments for Environmental Policy in the EU:An Overview*

RSC No. 98/13
Stephen TINDALE/Chris HEWETT
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in the UK*

RSC No. 98/14
Wolfram CREMER/Andreas FISAHN
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Germany*

RSC No. 98/15
Duncan LIEFFERINK
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in the Netherlands*

RSC No. 98/16
Kurt DEKETELAERE
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Belgium*

*out of print

RSC No. 98/17
Susana AGULAR FERNÁNDEZ
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Spain*

RSC No. 98/18
Alberto MAJOCCHI
New Instruments for Environmental Policy in the EU. *New Environmental Policy Instruments in Italy*

RSC No. 98/19
Jan Willem BIEKART
New Instruments for Environmental Policy in the EU. *Negotiated Agreements in EU Environmental Policy*

RSC No. 98/20
Eva EIDERSTRÖM
New Instruments for Environmental Policy in the EU. *Ecolabels in EU Environmental Policy*

RSC No. 98/21
Karola TASCHNER
New Instruments for Environmental Policy in the EU. *Environmental Management Systems: The European Regulation*

RSC No. 98/22
Jos DELBEKE/Hans BERGMAN
New Instruments for Environmental Policy in the EU. *Environmental Taxes and Charges in the EU*

RSC No. 98/23
Carol HARLOW
European Administrative Law and the Global Challenge

*out of print